

Legitimacy and Interpretation

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I. Introduction: Foundations

To seek the foundations of what is itself supposed to be foundational is – a delicate proposition. This book, if true to its name, would uncover constitutional law's philosophical foundations. But suppose that the law which founds a legal system is founded on nothing – not on philosophy, not on a revolutionary founding moment – but its own future. Suppose that a constitution will have been well founded only if it brings about, over time, those future-perfect conditions of community and authority, those practices of reason-giving and reason-accepting, within which alone its particular rendition of morality, justice, and legitimacy becomes meaningful. We ask after the law's foundations in philosophy; perhaps we should be asking after philosophy's foundational debt to the laws.¹

But what is meant by foundations here? American constitutionalism raises two foundational questions. There is first the question of legitimate authority, and second that of interpretive method.

A. Legitimacy

How can a two-hundred-year-old legal text, enacted by a series of majority votes under conditions very distant from our own, exert legitimate authority in the present? How can it possibly bind a majority today? A constitution of this sort is a scandal. It is an offense against reason, against democracy – against nature herself.

Or so we are told. In Chapter 4, this volume, Joseph Raz reiterates the position that the makers of an old law cannot reasonably claim legitimate authority over anyone today. In Chapter 2, Frank Michelman wrestles with the ultimate groundlessness of any law that attempts to find a purchase in the past. Indeed, for a good century, whose beginning we could mark with the publication of Tiedeman's *Unwritten Constitution* in 1890,² almost every "philoso-

sophical" inquiry into the United States Constitution has begun or ended by confronting the seemingly antidemocratic nature of constitutional law.³

Now, why exactly is old law vulnerable to this sort of attack? The basic thinking, in one form or another, is as follows. Who alone has the legitimate, final authority to make the decisions by which we live? We do. We *here and now*, in other words, could in principle govern ourselves. Doing so might be difficult; it might even be conceivable only as a regulative ideal. (We might have to deliberate with one another in certain ideal ways; the relevant "we" might have to be constructed as an ideal community or as an ideally free set of individuals; we might have to reason under conditions of ignorance; and so on.) But however the necessary conditions of self-governance are worked out, it is evident that a people cannot govern itself by *having* given itself law a century or two ago. A written constitution is a thing of the past; self-government belongs to the present.

Some Americans saw this difficulty from the beginning. "The earth belongs in usufruct to the living," wrote Jefferson. "The dead have neither power nor rights over it."⁴ Thus, a constitution that did not lapse every generation was unnatural: "[B]y the law of nature, one generation is to another as one independent nation to another."⁵ Nor were late-eighteenth-century Americans the first to question how an expression of sovereign will today could claim sovereign authority tomorrow. (They were only the first to solve this problem, in a particular way, as we shall see.) As Stephen Holmes observes,⁶ the same problem had already been articulated by many others, including Hobbes:

The Sovereign of a Common-wealth, be it an Assembly or one Man, is not Subject to the Civill Lawes. . . . For he is free, that can be free when he will: Nor is it possible, for any person to be bound to himself; because he that can bind, can release; and therefore, he that is bound to himself onely, is not bound.⁷

No sovereign self can bind himself "to himself" – so argued not only Hobbes, but also Bodin, Pufendorf, and Rousseau.⁸ All the authorities agree: The day that the sovereign people sought to bind itself to itself was a dark day. American written constitutionalism is contradictory. By purporting to bind the sovereign popular will tomorrow, the Constitution violates the very principle of self-government on which it stakes its claim to legitimate authority in the first place.

Let us call this conundrum the constitutional problem of time. With us, certain superficial answers to it are well known. Thus, the Constitution escapes the snare of time (it is often said) by the simple expedient of providing for its own amendment. Through Article V, which sets out an amendment procedure available to the people at any moment, the Constitution disclaims "perpetual" authority. It never purported to bind subsequent generations or even the same

generation at a later point in time. It does not bind the sovereign, only the politicians. Citizens can amend whenever they choose, and the conundrum thereby disappears.

But citizens cannot amend the Constitution whenever they choose. As everyone knows, amendment is very difficult. Article V imposes stringent supermajority requirements and onerous procedural obstacles before it permits amendment. As a result, constitutional law in the United States does in fact override popular will on any given day. That is part of its point. When it comes to certain elemental matters of political power, justice, and liberty, we are in fact governed, and designedly so, by reference to a text enacted generations ago as interpreted by a judiciary insulated from popular will.

Another tempting escape from the problem of time is to declare, all the same, that the majority of Americans today consent to being ruled by the Constitution in this way.⁹ Hence, there is no true temporal conflict after all. As long as the Constitution retains current majority consent, all the temporal difficulties again disappear.

But this is no answer. Assuming a tacit-consent claim in this context could overcome the weaknesses common to all such arguments,¹⁰ the claim still would not answer the problem of time. By locating legitimate authority in present majority will, the tacit-consent position tacitly consents to the following. If today's majority genuinely, deliberately wanted to establish a church or enslave a minority, there would be no reason of political principle why this majority shouldn't have its way. But American constitutionalism stands precisely for the principle that there *is* a reason why such a majority shouldn't have its way. It would be in violation of the Constitution. American constitutionalism affirms that there are limits *legitimately and rightfully* imposed on majority will by virtue of a certain kind of democratically enacted text until that text is amended through appropriate (onerous, supermajoritarian) procedures. The problem of time is nothing other than the problem of explaining how majorities today and tomorrow can rightfully and legitimately be bound by limits on their power enacted generations ago. Invoking current majority consent as the source of the Constitution's legitimacy does not save constitutionalism from the problem of time. It repudiates constitutionalism, implicitly conceding that the problem of time is insuperable.

In other words, if we say that a constitution can escape the problem of time just insofar as it continues to comport with present majority will, we are saying that a constitution remains fully legitimate only to that extent. But a fully legitimate constitution, so defined, could not fully function as a constitution. It could, to be sure, impose restraints on local or individual actors who acted contrary to the present will of the national majority. But it could not perform at least one definitive constitutional function. It could impose no restraints on

governmental action that accurately represented deliberate national majority will. If the Constitution's purchase on legitimacy depends on its conformity with present majority will, the price of attaining this legitimacy would be constitutionalism itself.¹¹

Thus emerges what appears to be a fundamental antithesis between constitutionalism and democratic self-government. For some time now, American constitutional theory has expressly embraced this antithesis as its starting point, usually under the name of the "counter-majoritarian difficulty."¹² But the embarrassing conclusion is that constitutional theory has never solved the constitutional problem of time that Hobbes and others identified long ago. As a result, American constitutional law has no account of its own legitimacy.

B. Interpretation

The second foundational question of constitutional law is that of interpretation. Embarrassing conclusion number 2: Constitutional law in the United States has no very good account of its own interpretive method. Here all the authorities disagree. There is no consensus on some of the most basic questions concerning what counts as a proper method of constitutional interpretation.

There are several plausible sources of guidance in constitutional interpretation, all of which flourish in the general American practice of constitutional argument. For example, in roughly ascending level of breadth, interpretive guidance is sought in the "plain meaning" of the text, the "original understanding," precedent, Anglo-American traditions, contemporary consensus, consequentialist considerations, and general moral or philosophical argument about "fundamental" values such as liberty or justice. None of these sources of constitutional meaning is authoritatively accepted as dispositive; some of them are not authoritatively accepted even as *relevant*.

This malady may not be the fault of constitutional law. A number of disciplines today seem to suffer from a kind of hermeneutic neurasthenia. Perhaps what constitutional law needs, on this score, is no different from what literary criticism needs: a general theory of interpretation. Reflecting this sort of thinking, recent legal scholarship includes a number of efforts to articulate a general theory of interpretation that is supposed to tell us what all interpretation properly consists of and hence what constitutional interpretation ought to consist of. There is, for example, a universal intentionalist position, according to which all interpretation (and therefore constitutional interpretation) properly consists of determining the original intentions of the speaker(s) or author(s) at issue.¹³ There is also a vulgar deconstructive position, according to which all interpretation actually consists of readers reading their own constructions into the interpreted object.¹⁴ And Ronald Dworkin has suggested

that all interpretation properly consists of striving to make the interpreted object "the best it can be."¹⁵

This turn to hermeneutics to solve the riddles of legal interpretation might come as a surprise to hermeneutics itself, which not long ago turned to law to solve the riddle of interpretation as such.¹⁶ But according to a growing body of thought, constitutional law must be rooted in a general philosophy of interpretation, which, at least initially bracketing all questions of political philosophy, is said to dictate in broad outline the proper interpretive method for constitutional law.

C. Legitimacy and Interpretation

I submit that this approach to constitutional interpretation is quite mistaken. In the first half of the remainder of this essay, I address those approaches to constitutional interpretation that seek to bracket the distinctive problems of political theory – and particularly the problem of legitimacy – that constitutionalism raises. I argue that such approaches cannot succeed. In constitutional law, legitimization precedes interpretation.

In the second half of the essay, I propose a solution to the constitutional problem of time and hence to the countermajoritarian difficulty. I then sketch out an interpretive method that would be consistent with this solution. These modest aims are motivated by the hope that a distinctive understanding of the foundations of written constitutionalism – foundations found neither in a timeless philosophy nor in an authoritative foundational moment, but in the Constitution's own temporal extension – lies at the heart of both the Constitution's legitimacy and its proper interpretation.

II. Methodologies of Constitutional Method

In constitutional law today, there is a surfeit of interpretive approaches: originalist, literalist, activist, passivist; moral-philosophical, structural, law-and-economical; precedent-based, process-based, tradition-based, justice-based; and more besides. Some of these converge in any given dispute; others conflict. We could tell ourselves that this multiplicity of method is inevitable, that it is even desirable. Our cup runs over; let's go bobbing for arguments as suits the case.

If, however, it seems unappealing to make method the handmaiden of result, then we are obliged to think about what sort of argument would have to be made in order to establish that a given method of constitutional interpretation was the proper one. In other words, the question for constitutional interpretation has today become: Is there an appropriate method for determining the appropriate method of constitutional interpretation?

We can distinguish three possible answers to this question: three methodologies of constitutional method. The first I shall call the methodology of universal hermeneutics; the second, that of the concept of law; the third, which I will advocate, that of legitimization.

A. Universal Hermeneutics

Suppose we said that interpretation is interpretation. What constitutional law needs is not political theory, but interpretive theory. It needs only to understand what is true of all interpretation. It needs a universal hermeneutics.

This remarkable ambition – to understand constitutional interpretation in light of a unified account of all interpretation – is pursued in several quarters today. As already noted, the three most prominent such efforts are intentionalism, vulgar deconstruction, and Dworkin's best-it-can-be interpretivism. What these approaches have in common is that they all endeavor – at the stage of the inquiry that specifies the appropriate contours of interpretive method – to begin with interpretive theory, confronting only later, if at all, the difficulties of political philosophy, and especially political legitimacy, raised by constitutional law. Thus, universal intentionalism differs from familiar originalism in an important respect. The familiar originalist freely concedes the existence of a variety of forms of textual interpretation; as far as he is concerned, there is no objection to the interpretation of (say) poetry in nonintentionalist fashion. But when it comes to constitutional law, he will say that originalism is the only democratically *legitimate* interpretive method that judges may engage in.¹⁷ By contrast, the universal intentionalist says that originalism is the only *possible* or the only *conceptually tenable* mode of interpretation, whatever text is to be interpreted.¹⁸

What should we make of these universal hermeneutic strategies? One option would be to join the debate they open up. In other words, we could try to ascertain for ourselves the best theory of interpretation. I will not do so. Instead, I want to explore a much narrower observation. In all three of the positions described, a certain fatal incompleteness – a self-referential incompleteness – is inherent in the argumentation. In every case, this incompleteness leaves open a kind of window. It leaves open the possibility of another mode of interpretation, one that was supposed to have been ruled out by the universal hermeneutics but that turns out to be necessary to sustain the universal hermeneutic position itself. And through this window escapes the hope of pinning down a single proper method for constitutional interpretation.

The Self-referentiality Problem. Take the claim that all interpretation is intentionalist, and suppose that a judge is attempting to read a text using a methodology that he says is nonintentionalist. Perhaps he is seeking to make the text

the best it can be. Perhaps he is seeking to arrive at the reading that will best further justice. Or perhaps he just skips every two words and makes the best sense he can of what is left over.

The universal intentionalist must respond in one of two ways. He could say that every one of these manners of reading a text, along with every other imaginable way of reading it, is in fact intentionalist. That claim would keep his thesis intact, but render it trivial. Or he could argue that nonintentionalist readings are possible but that they are not “interpretation” at all, properly understood. This is just what Stanley Fish, in his universal intentionalist mode, says:

[S]omeone committed to the distinction between intentionalist and nonintentionalist interpretation might reply . . . that one can always find meanings in a text other than the ones intended by the author. This statement is undoubtedly true, but the question is, in what sense would that action be an instance of interpreting? Suppose, for example, my method of interpreting a text consists of taking every third word of it and seeing what patterns of significance then emerged. . . . I am playing with the text. . . . I am not trying to figure out *what it means* but trying to see what meanings it *could be made to yield*. I have no necessary quarrel with those who want to do that . . . , but *I do not think it should be called interpreting*.¹⁹

There is a difficulty in this passage. What we are reading seems itself to be an interpretation – of “interpretation” – and it is not an intentionalist one.

Here is what it means to “interpret” a text, we are told, but the *here* is not located in any particular speaker’s intentions. Here is what it means to say of a text “what it means.” This is not a claim about what you or I or any particular author intended when using the word “interpretation.” Nor is Fish saying merely, “This is what *I* intend when *I* say ‘interpretation.’” We are told rather what interpretation *really* means: what conduct should be counted as “interpretation,” properly so called. For the universal intentionalist, therefore, all instances of proper interpretation are intentionalist – but one.

Perhaps this incompleteness may seem at first a technicality, a small logical hitch that should not affect the rest. But it is no technicality. If “interpretation” has a true or proper meaning, regardless of what any given user of the term intends or intended, then why not the “freedom of speech” or “the equal protection of the laws”? Universal intentionalism, through its own propositions, opens up at least one mode of interpretation that is not intentionalist. And this other mode of interpretation happens to be one that has traditionally opposed itself to originalist constitutional interpretation.

There are roads that universal intentionalism might pursue to extricate itself from this self-referential difficulty. I will get to them presently. First, let us observe a similar problem in vulgar deconstruction and in best-it-can-be interpretation.

In vulgar deconstruction, the claim is that there can be no true or correct meaning of a text (nor a true or correct fact about the world) against which we could measure our interpretations, because any statement of the text's true or correct meaning (or any statement about the world) would itself have to be an interpretation. Hence, there is no such thing as a right or wrong interpretation at all. Textual meaning is always a meaning constructed by readers, and all the world's a text. Thus, of poems: "[R]eaders do not decode poems; they make them."²⁰ Of texts in general: "[A]ll readings are misreadings."²¹ The claim here is *not* that intended meaning ought merely to be deprivileged; it is that we cannot even say of an interpretation that it gets the intended meaning right or wrong, because what we deem to be the speaker's or author's intention is just another interpretive construct. "[A]uthorial intent" is not "a positive entity that preexists" interpretation, against which interpretation could be measured; it is "a construct of interpretative activity, rather than a ground for the activity."²² (These are the claims that differentiate vulgar deconstruction from the work of Jacques Derrida.)²³

The self-referential difficulty here is obvious. In fact, it is a double difficulty. One who makes these claims tells us what he means to say so that we can correctly interpret his text. For example, he insists that we would misunderstand him if we took him to be denying the existence of reality, because his thesis is merely that what we think of as "reality" is an interpretive, linguistically mediated construct.²⁴ But part of what he means to say turns out to be that a text cannot be correctly interpreted by reference to what its author means to say (which, as a piece of interpretively constructed reality, cannot serve as a "ground" on which to rest interpretation). In other words, he is both (a) declaring that, in reality, whatever we say or think about it, there can be no reality known by us other than what we say or think about it, and (b) asking us to understand him for what he means to say, which happens to be that an author cannot be understood for what he means to say.

There must be one set of statements that exceed the reach of vulgar deconstruction: namely, the propositions of vulgar deconstruction itself. To understand these propositions as their proponent would have us understand them, we must both take them for what he means to say and take them as an effort to get interpretation right.²⁵ This means that vulgar deconstruction cannot make itself understood without establishing at least the possibility of a form of reading – perhaps two forms of reading – that its putatively universal hermeneutics was supposed to have ruled out.

The same is true of Dworkin's account. He wants to collapse the distinction between an interpretation of what something really is and an interpretation that makes the interpreted object the best it can be. An interpretation is correct (it gets the interpreted object right) if it makes the interpreted object the best it

can be. To collapse this distinction is intelligible, provided that an exception is made in one case – the case of interpreting interpretation itself.

For if there were no exception in that case, then Dworkin would be saying that his interpretation of interpretation is correct *because* it makes interpretation the best it can be. But even if Dworkin's interpretation of interpretation *did* make interpretation the best it could be, his interpretation of it could not claim correctness on this ground. That would make the argument circular.

To see this circularity, consider the following argument about the nature of interpretation. "Interpretation properly consists of treating every text or practice as something whose principal purpose is to reveal the nature of God. To interpret something correctly just is to interpret it as having this purpose. How do I validate this assertion? Nothing could be easier: This interpretation of interpretation makes interpretation a practice whose principal purpose is to reveal the nature of God. Therefore, it is the correct interpretation of interpretation." Or: "Interpretation properly consists in making the interpreted thing the worst it can be.²⁶ To interpret something correctly just *is* to interpret it in such a way as to make it the worst it can be. How do I validate this assertion? Nothing could be easier: This interpretation makes our practices of interpretation the worst they can be. Therefore, it is the correct interpretation of interpretation, don't you see?"

To validate his interpretation of interpretation, Dworkin cannot *merely* say that it makes interpretation the best it can be.²⁷ He must also say: and (*not hence*, but *and*) this is the *right* interpretation of interpretation. He must invoke, implicitly or explicitly, some criteria of rightness that identify the right interpretation of interpretation *as* the one that makes it the best it can be, standing independent of whatever argument he would use to show that his interpretation of interpretation *is* the one that makes it the best it can be. In other words, to validate his interpretation of interpretation, he must rely on supplemental criteria of interpretive correctness independent of those given by his theory of correct interpretation. In Dworkin's writings, these independent criteria appear in the form of broad-brush empirical claims, suggesting that when we interpret things, we do in actual fact try (whether we know it or not) to make the interpreted object the best it can be.²⁸ He claims, in effect, to have found the actual purposive structure underlying most (perhaps all) of our practices of interpretation.

But precisely by purporting to identify the actual purposive structure underlying interpretation, Dworkin necessarily opens up another possibility of interpreting rightly independent of striving to make the interpreted object the best it can be. He opens up the possibility of interpreting a practice by reference to its actual purposive structure, regardless of whether so interpreting it makes it the best it can be. Of course, "actual purposive structure" is my phrase, not Dworkin's. But whatever they are, the criteria of right interpre-

tion to which Dworkin must have recourse in order to validate his interpretation of interpretation will also be applicable to other objects of interpretation. Dworkin may try to suppress these independent criteria of right interpretation, but he cannot rule them out, unless he wishes to leave his entire theory of interpretation bottomed on pure circularity (the circularity of saying that the best-it-can-be interpretation of interpretation is the right interpretation of interpretation because it makes interpretation the best it can be). In other words, to make his own point, Dworkin must open up the possibility of a mode of interpreting rightly that his universal hermeneutics was supposed to have ruled out.

A Way out of Self-referentiality? There is an escape route through which a unified field theorist of interpretation might avoid the self-referentiality problem that we have found in each of the three universal hermeneutic positions just canvassed. In each of these three cases, self-referentiality became a problem because the would-be universal theory of interpretation was treated as itself an instance of interpretation (an interpretation of interpretation). But a theory of interpretation need not be, at least on its own terms, an instance of interpreting at all.

A theory of interpretation could instead take the position that it was offering an account of what interpretation *is*, not what it *means*. A scientist who propounds a theory of gravity is not (it might be said) offering a theory of gravity's meaning. He is trying to discover what gravity is. He is trying to describe the relevant phenomena and concepts accurately. Similarly, a theory of interpretation may be said to be an attempt to describe accurately the phenomena and concepts actually involved in the practice of interpretation, not an inquiry into interpretation's meaning. And this same theory of interpretation might hold that interpretation is always an inquiry into meaning, so that an account of what interpretation is (rather than what it means) is not an instance of interpreting.

Observe that this line of argument is not available either to vulgar deconstruction or to Dworkin, because according to the express premises of both, their accounts of interpretation *are* instances of interpretation. (They purportedly do not allow for the adoption of an "Archimedean" perspective from which one might say what interpretation is, as opposed to offering an interpretation of it.) But a version of this reply is available to the universal intentionalist. Universal intentionalism (it might be said) tells us what textual interpretation is, not what any text means.²⁹ Thus, there is no self-referentiality problem.

This reply, whatever its merits, does not eliminate the difficulty I am trying to bring out. The universal intentionalist's position is now: When a text comes into play, interpretation must be intentionalist; but interpretation itself, stand-

ing (as it were) outside a text, can be taken to refer to certain concepts and phenomena whose content does not depend on any particular speaker's intentions. In other words, to make good on the claim that he is telling us what interpretation is, rather than what it means, the universal intentionalist is obliged to say that the word "interpretation" here serves as a label for certain concepts and phenomena (or a "practice") whose content may be determined nonintentionalistically.

But this means that the universal intentionalist has acknowledged a nonintentionalist mode of understanding language: understanding words, that is to say, by analyzing the actual content of the concepts or phenomena to which they are said to refer. In this way, universal intentionalism has once again been obliged to recognize two distinct modes of understanding language, one intentionalist, the other nonintentionalist. And as it happens, both ways of understanding language may be applicable when we are confronted with a norm-prescribing text like the Constitution. Thus, if the concept or practice of "interpretation" can be determined in nonintentionalist fashion, so too could the "equal protection of the laws." We could endeavor to say what equal protection *is*, in the same sense that the universal intentionalist says he is telling us what interpretation is. Of course, the intentionalist might say that, unlike interpretation, the equal protection of the laws is not the sort of thing of which one can say what it is (as opposed to what it means). But in this reply the intentionalist would in fact only be giving us his account of what equal protection is.

The intentionalist at this point might reply, "Very well, you could try to determine what equal protection is, rather than what it means, in the same way that I have determined what interpretation is. But in that event just don't say that you're interpreting. Just don't call what you're doing interpretation of the constitutional text."

This claim, however, no longer has the force the intentionalist wants it to have. As we saw earlier, when the universal intentionalist initially said to nonintentionalists, "Just don't call what you're doing 'interpreting,'" his charge was that nonintentionalist readers were merely "*playing with the text*"; that they were merely seeing what meanings a text "*can be made to yield*."³⁰ But the story is different now that the intentionalist has conceded that he himself engages in a nonintentionalist process of understanding a word *x* (consisting of determining the actual content of *x*, rather than the intended meaning of *x*) and that a nonintentionalist reading of the Constitution's words could engage in the same process. For if the intentionalist is not playing with "interpretation" when he tells us what it really is – if he is not merely seeing what meanings "interpretation" can be made to yield – then neither is one who tries to say what equal protection really is. If he can say *definitively* what "should be called interpreting,"³¹ why can't someone else say definitively what should be called the equal protection of the laws? Hence, when

the universal intentionalist now says, "Just don't call what you're doing 'interpretation,'" he no longer means, "Just admit that you are playing with the text." He has now said nothing more than "Just don't call what you're doing 'intentionalist.'" And with that, there need be no disagreement.

What there *would* be disagreement over is which method of reading is appropriate when we are confronted with a text like the Constitution. Someone might object that judges have no proper authority to take the "equal protection of the laws" the way universal intentionalism takes "interpretation": as the label for a concept or practice the contents of which are to be determined through ahistorical, nonintentionalist analysis. (Or the objection might be that such an analysis would be permissible only if the founders intended it.) But this objection would entail a very different defense of intentionalism – a defense of intentionalism based on a theory of political legitimacy, not a theory of interpretation.

B. The Concept of Law

Suppose we abandoned the ambition of deriving constitutional method from a unified theory of interpretation. We might still say that constitutional interpretation has no need to launch itself into theories of democracy or political legitimacy. We might say instead that the Constitution is *law*. Legality is the feature of the Constitution dispositive of its proper interpretation. Never mind legitimacy; leave that to politicians and political theorists. All a constitutional judge needs to know is how to interpret law.

This strategy – of finding a unified interpretive method applicable to all law and hence applicable to the Constitution – which in its scope and ambition is only a little less remarkable than the first one, also has its adherents. For example, in *The Tempting of America*, Robert Bork offers an argument that the Constitution's status as law dictates originalist interpretation:

When we speak of "law," we ordinarily refer to a rule that we have no right to change except through prescribed procedures. . . .

What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law's enactment. . . .

If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. . . . There is no other sense in which the Constitution can be what Article VI proclaims it to be: "Law."³²

Here is a defense of originalism that once again eschews the more familiar, legitimacy-based line of argument (although in other passages Bork pursues this line as well). The claim is not that the Constitution must as a matter of popular sovereignty be enforced according to the will of those who ratified it. The claim is that the very concept of law mandates originalism.

There is at least one pretty good objection to Bork's syllogism: Its major premise is manifestly false. It is not the case that the meaning of all law – not even of "all other law" than constitutional law³³ – is "the meaning the lawmakers were understood to have intended" "at the time of the law's enactment." The law of custom, the oldest law of all, is not enacted by any lawmakers and cannot possibly be said to mean what the "lawmakers were understood to have intended" "at the time of . . . enactment." Moreover, the common law, even beyond its consuetudinary origins, was and is characteristically distilled from a series of judicial opinions. If the meaning of cases A, B, and C, handed down at disparate times by different judges, is given (at a still later time) by a process of reconciling the holdings of these cases while taking into account diverse elements of legal policy and principle, how can we say that the meaning of A is that which the "lawmakers," whoever they might be, were originally understood to have intended? Even in the case of statutes, while intentionalism is certainly a dominant interpretive approach, the law's meaning is frequently developed in altogether nonintentionalist fashion. A statute's meaning may have accreted through case law (a famous example in the United States being the development of the Sherman Antitrust Act). Or a statute's meaning may have developed through the pragmatic interpretation of administrative officers charged with its implementation.

In other words, even if we limited ourselves to our own legal system, and even if we excluded constitutional law itself from the analysis, it would still be utterly impossible to conclude that the meaning of all law is the intentionalist meaning that Bork describes. Some law in our system is interpreted in accordance with original intentions. But there are far too many kinds of legal practices, with far too many modes of meaning-production, to support an account that purports to specify any single methodology as the methodology by which all law receives its meaning.

This is why one finds the argument from law being deployed so variously in constitutional scholarship. Here are Charles Black's conclusions, in a book on constitutional judicial review, about the nature of law:

[L]aw is also insight and wisdom and justice. We have always intuitively known this. . . . Who ever felt comfortable about a judge, however learned and upright, who had no common sense and no . . . deep feeling for the goals after which the law is questing?

. . . Underneath all I have said is the conviction that "decision according to law" can be a meaningful phrase, even if the decision in question is made by something other than a machine. . . . If [this] is not true, then there is no substance in our philosophy of government – or, indeed, of law itself.³⁴

This is another appeal to law, but with a profoundly different apprehension of what law is. As a result, Black demands in the name of the law what Bork re-

jects in the name of the law: the introduction of the judge's own wisdom and sense of justice in constitutional adjudication.

Or consider Herbert Wechsler's well-known endeavor (aped by none other than Robert Bork) to make the demand for "neutral principles" the operative basis for constitutional interpretive method.³⁵ He too understood his position to be grounded in the proposition that courts must function as "courts of law."³⁶ Yet he concluded that the "main qualities of law, its generality and its neutrality," furnished a ground for rejecting those interpretive methods that regard constitutional provisions as bearing a "fixed 'historical meaning,'" a meaning "fixed by the consensus of a century long past."³⁷

The examples could be multiplied. The concept of law has been invoked on behalf of a commanding principle of stare decisis in constitutional interpretation; it has been invoked in defense of judicial restraint; it has been invoked to justify adherence to the "plain meaning" of the constitutional text.³⁸ Not that any of these arguments is mistaken. The diverse predication of law on which they rest are all imaginable and defensible within the confines of our own legal system. As a result, however, the concept of law does not choose among them.

To state what should be obvious: I am not saying that there can be no unified theory of law, and I am not saying that the Constitution's status as law is irrelevant to constitutional interpretation. The point is simply that the Constitution's status as law is consistent with most of the interpretive methods advocated in the field today, and that a unified theory of law, if there were such a thing, could not both cover the territory and dictate a single method of legal interpretation.

To be sure, the fact that a variety of forms of legal interpretation exists in our system is not an argument that it ought to exist. The diversity of our actual legal interpretive traditions does not preclude the search for a unified normative theory of law, and such a theory could certainly purport to dictate a single method of legal interpretation. Austin's command theory of law is perhaps an example of such a theory; as a systematic will-based account, it might (if it had been successful) have had strong interpretive implications, broadly suggestive of intentionalism as the proper interpretive method throughout the legal system. Joseph Raz's moral theory of law is perhaps another example; as a systematic reason-based account, it might also (if successful) have strong interpretive implications, broadly suggestive of an approach in which judges seek to formulate rules on the basis of "right reason,"³⁹ mindful of the law's proper "social functions."⁴⁰

Without entering into the merits of any such theories of law, we can say this much: A theory of law must either take the law as it is or tell us what it ought to be (or both). To the extent that a tendentious thesis about the nature of law is made (like Bork's) on the basis of nothing more than a descriptive slap at

the actual legal scene, it must accept the variety of legal interpretation in our system and must therefore leave us with an open question when it comes to selecting the form of legal interpretation appropriate to constitutional law. To the extent that a more sophisticated jurisprudence offers a thoroughgoing normative vision of law, and calls for a single interpretive method, it must select one such method from the still-greater variety of actual and imaginable legal forms. But this it cannot do on the basis of the concept of law alone.

The contrast between Austin and Raz (which mirrors, at a deeper level, that between Bork and Black) bears this out. Legal interpretation, for all that the concept of law requires, can be organized at a minimum in two profoundly different ways. It can be organized around the determination of a sovereign's will, and it can be organized around the pursuit of reason, justice, wealth maximization, or some other criterion of the right thing to be done. These two possibilities are instinct in the concept of law. Law has an irreducibly double nature: Law is the word of the sovereign, and law is also the right.

This double nature does not imply a "fundamental contradiction." It does not mean that law cannot integrate these two aspirations. And doubtless it could be said that the rule of law imposes inherent limits barring a system of legal interpretation from gearing itself excessively toward either sovereign will or the right. But it remains the case that a system of legal interpretation can be substantially oriented toward either pole – and still qualify as law. Nothing prevents the constitutional rules of a legal system from opting for either approach.

This means, however, that when it comes to the interpretation of the constitutional rules themselves, the status of the Constitution as law cannot itself dictate a particular interpretive method. There will always be at least two interpretive methodologies available: The Constitution could be read according to the will of the sovereign agents (whoever they are said to be), or it could be read according to the right (whether the right is understood in terms of reason, justice, economic efficiency, or something else again). If someone says that only one of these two overarching interpretive methodologies will permit constitutional law to qualify legitimately as law, what must be meant by such an assertion is that the insisted-upon interpretive method is necessary to make constitutional law legitimate, not to make it law.

C. *Legitimation*

The lesson of the preceding two sections is that constitutional interpretation cannot be derived from the bare fact that the Constitution is an object of interpretation, or from the only slightly less bare fact that the Constitution is law. We are obliged, instead, to say what mode of interpretation is appropriate to

this particular kind of text, this particular kind of law, this world-changing practice brought into being in the United States in the late eighteenth century. The thought that constitutional interpretation must respond to the unique position of constitutional law underlies the third methodology of constitutional method. This is the methodology of legitimization. It demands that judges select an interpretive method for constitutional law in accordance with the requirements of legitimacy that pertain to the extraordinary position of an unelected judge applying a written constitution in a democratic polity. This approach to interpretation is perhaps the most widespread of all in American constitutional practice, if we count not only the thoughtful body of work that has grappled with the “counter-majoritarian difficulty,” but also the whole, less thoughtful debate about judicial “activism.” The antiactivist argues against certain interpretive methods on the ground that they change the meaning of the Constitution or otherwise result in judge-made constitutional law that cannot legitimately be imposed on the nation. The antiactivist argument is, therefore, a legitimacy argument.

Those who make this argument, however, have invariably neglected to explain why a judge who follows their preferred interpretive method (typically originalism of some form) will produce law that *can* be legitimately imposed on the nation. In other words, antiactivists make claims about the requirements of legitimacy that apply to constitutional judges without ever confronting the problem of legitimacy that applies to constitutional law as such (the constitutional problem of time). Former judge Bork is a prime example. He has recently confounded many by suggesting that judicial constitutional decisions be subject to legislative override.⁴¹ How could such a devotee of the Founding suddenly become a partisan of legislative supremacy? The answer is that Bork has merely worked out the logic of his own position: However shrill was his condemnation of the illegitimacy of nonoriginalist interpretation, he never had anything like an adequate account of why originalist constitutional law *would* have been legitimate. On the contrary, precisely that which permitted him to call judge-made law a species of tyranny (its imposition of law on the nation contrary to present majority will) left him with no real defense and no true understanding of constitutional law at all.

So we might say that the methodology of legitimization demands, when fully thought through, a confrontation with the constitutional problem of time (a confrontation whose outcome is, of course, not guaranteed). What grounds this approach? Why should legitimization precede interpretation? The answer is twofold: There is an answer internal to the institution of constitutional law, and there is an answer from the perspective of political theory as a whole.

The internal answer is that constitutional interpretive method has a duty to find a way to respond to the distinctness of the Constitution – a way to pre-

serve it as the extraordinary thing that it is. This internal duty is expressed in canonical form when judges remind themselves “that it is *a constitution* we are expounding.”⁴² And what is this revolutionary thing that Americans learned to call a constitution? A written constitution of the American variety presents itself fundamentally as two things: (a) as an act of the people and (b) as foundational law. In other words, it presents itself as – it is supposed to be – an act of popular self-government and an act of law that establishes the foundational institutions and constraints within which the (democratic) political-legal order is to operate.

Now, if interpretation could preserve constitutional law exactly as the law intended by the relevant people at the moment of ratification, the Constitution would become, as time passed, less and less recognizable as an act of popular self-government today. (It would appear to be more and more an act of imposition by one “generation,” as Jefferson said, upon successive ones.) But if interpretation could preserve constitutional law as an exact expression of popular will today, then the Constitution would become in an important sense inoperative as foundational law. (It would cease to impose constraints on majoritarian action.) Solving the constitutional problem of time is nothing other than finding a way to allow the Constitution to be *a constitution* – in the American sense.

From the external point of view of political theory, the reason that constitutional interpretation must follow from a theory of constitutional legitimacy is that *all* law ought to be interpreted in accordance with the grounds of its legitimate authority. For if law is otherwise interpreted, then it loses its claim to legitimate authority. Legitimacy is obviously not the only desideratum of law. Let us say that it is a necessary condition of law’s acceptability. But no unified method of legal interpretation follows from this observation. There is no reason why the legitimate authority of different kinds of law must all rest on identical grounds. Quite the contrary.

The authority of a judge’s decision might rest principally on judicial impartiality and reason. That of an administrative regulation might rest principally on the agency’s superior technical knowledge. That of a statute, on its representing the will of a majority of representatives accountable to electoral majorities. Each of these different grounds of legitimate authority might in turn generate different interpretive practices (e.g., respectively, a jurisprudence of common-law reasoning, of deference to administrative agencies, or of adherence to legislative intent). But ultimately the legitimate authority of all these genuses of law will have to back up upon that of the basic constitutional order, which calls for the election of the legislators and executive officers, who enact the statutes, commission the regulators, appoint the judges, and so on. Everything will depend upon the legitimacy of the system’s constitution, and in the case of a written constitution, none of the relatively simple grounds of

authority just mentioned can apply. Instead, to preserve constitutional law's legitimate authority, constitutional interpretation would have to answer a very difficult question. In the American case, it would need an account of how a two-hundred-year-old text, enacted by past democratic majorities, could possibly continue to exert legitimate authority over democratic majorities in the future. Constitutional interpretation must solve the constitutional problem of time.

III. Demo-graphy in America

Let us try, then, to solve it. The constitutional problem of time arises from a very particular conception of self-government. Solving the problem requires that we identify this conception and replace it with another.

A. Popular Voice, Constitutional Text

Self-government, as we almost invariably understand it, consists ideally of government by the will or consent of the governed. This holds for the most cynical as well as the most romantic depiction of self-government. We might, in other words, conceive self-government in terms of atomic individuals or in terms of an organic community, but still we would begin with the premise that true self-government (whether we are thinking of the government of each individual or the government of all by the general will) consisted of government by the self's own will. This way of thinking has a particular temporal orientation. Whether we understand the will of the governed through a hyper-disintegrative lens such as public choice or through a hyperintegrative lens such as fascism, in either case, and in all the intermediate cases, we begin by understanding self-government as, ideally, government by the will of the governed *here and now*.

Rousseau expressed this ideal in exacting terms: "Now the general will that should direct the State is not that of a past time but of the present moment, and the true characteristic of sovereignty is that there is always agreement on time, place and effect between the direction of the general will and the use of public force."⁴³ Aside from the mysteries of Rousseau's "general will," this idea has been everywhere in evidence across a wide terrain of modern political thought. The same insistence on present will was in play when Hobbes and other classical jurists said that the sovereign will could not bind itself to itself, when Jefferson said that each generation stood to the next as one foreign nation stands to another, and when Professor Bickel wrote of the "counter-majoritarian difficulty."⁴⁴

I call this conception of self-government speech-modeled. One reason is that in all its widely different forms, it tends to express itself in a language of

speech, voice, conversation, dialogue, and so on.⁴⁵ And the reason for this language of speech is in turn the temporal orientation that we just observed. If present sovereign will is what ought to govern, the ideal political desideratum is never an authoritative text (at best a recordation of a past will), but rather an authoritative voice. If the governed are to govern themselves here and now, then somehow or other, the people must speak.

Now, the central problem for every conception of self-government based on the ideal of government by present popular will has always been that of fundamental rights. To be sure, the prevailing understanding of democracy embraces the idea that certain fundamental rights – of conscience and speech, of equality before the law, of property, and so on – are beyond the reach of majority will. Textbook definitions of democracy invariably include such rights. The point, however, is that the textbooks cannot explain how these fundamental rights sit with the majority-will conception of self-government that exists alongside them.⁴⁶ How can any political actor in a speech-modeled system enforce fundamental rights against popular will without arrogating to himself dictatorial powers? Without acting fundamentally illegitimately? The prevailing understanding of democracy has no good answer to this question, which is why a political scientist as thoughtful as Elster finds himself obliged to define democracy as “simple majority rule, based on the principle ‘One person one vote’ ” – period. The crucial normative problem for every speech-modeled conception of democratic self-government has always been that of explaining the legitimate foundation of constitutional rights.

There is a well-known and well-worked repertoire of possible solutions to this problem. Very broadly speaking, we may categorize this repertoire as follows. Within a conception of self-government based on the will or consent of the governed, only a limited number of moves – four, to be precise – can be made to legitimize fundamental rights. Either there must be an appeal to timeless, pre-political rights superior in authority to all temporal exercises of power, or else there must be an appeal to the past, present, or predicted will of the governed. These are the only sources to which the speech-modeled conception can turn for ultimate normative authority. The appeals to pre-political rights and to past will are illustrated by the earliest and most primitive solutions to the fundamental-rights problem: natural law and social contracts. The appeals to present and predicted popular will are illustrated in the latest and most sophisticated solutions, which argue for fundamental rights as the necessary conditions of deliberative democracy in the present,⁴⁷ or as the rights that would be consented to by rational persons under hypothetical conditions.⁴⁸

These four moves or solutions, not coincidentally, appear over and over in constitutional thought. They underlie the major schools of constitutional interpretation.⁴⁹ Appeals to pre-political or timeless rights, more prominent in an earlier era than they are today, still flourish in the area of constitutional law

called the right of privacy.⁵⁰ The appeal to past will underlies originalism and “plain-meaning” jurisprudence.⁵¹ The present-tense approach is visible in the contemporary-consensus and process-based schools.⁵² And predicted will is exactly what Bickel in *The Least Dangerous Branch* (and others later) concluded should guide the Supreme Court in constitutional adjudication.⁵³

The point is that all of these various strategies are committed to the same starting point: a presumptive antithesis between constitutional rights and the ideal of self-government (understood as government by the will or consent of the governed). Solutions to this antithesis may be possible, but they necessarily distort the situation of constitutional rights in the United States, because the entire problematic within which they operate misunderstands American written constitutionalism. American constitutionalism broke – sharply and self-consciously – from the confines not of democratic self-government, but of speech-modeled self-government. American constitutionalism models self-government not as government by popular will or voice, but as government by popular authorship. Because of the emphasis on popular authorship, I will call the American conception of self-government *democracy as demo-graphy*.

B. Committed to Writing

What does it mean to break with the idea that self-government ideally consists of government by the self’s own present will or consent? It means, among other things, that if we could imagine the entire American people made equal, if we could imagine this people assembling in one body at one time, deliberating with ancient wisdom, and ultimately declaring in one voice its sovereign will – if we could even imagine this supreme voice being instantaneously followed, its will translated immediately into governance in every particular – we still would not have imagined self-government.

To say so is to suggest a relationship between time and freedom very different from what is conceivable on the model of speech. The speech-modeled conception of self-government punctuates time, crystallizing legitimate authority in the will of a single privileged moment (whether past, present, or predicted). This punctuated temporality is inadequate to capture the dimension of temporal extendedness integral to our moral and political lives. (It is because of this inadequacy that speech-modeled thought finds itself drawn to solutions that flee time altogether.) An alternative conception of the ideal relation between time and freedom would imagine self-government as a temporally extended project.

Here, in broad brush, is the starting point of this alternative conception. Of all animals, only humans make history; only humans make themselves over time. Extended temporality is a constituent part of our being. To be a person takes time. A person, we might say, does not exist at any given time. This

means that freedom is possible only over time. To be free in the human sense, it is not sufficient to act on one's will at each successive moment. That is animal freedom. Human freedom requires a relationship of self-making to one's life as a whole: It requires individuals to give their temporally extended being a shape or purpose of their own determination.

Now, the capacity of humans to relate to themselves over time has a condition: the capacity to write. (Some animals speak; only humans can write.) Humans relate to themselves over time through writing. Autonomy is therefore always autobiography: not in the sense of writing a life after the large facts, but before and during those facts. Every exercise in human freedom is an exercise in self-life-writing. It is an exercise in living out commitments of one's own making. Freedom in the human sense requires that we give our lives purpose, meaning, something at which to aim. We must give our lives, in two words, a text.

Similarly, to be a people takes time; it takes generations. To realize within a polity a new set of foundational principles may take a century – or two or more. To be self-governing, a people must attempt the kind of self-government that takes place over generations. It must attempt the reins of time.

American constitutionalism was revolutionary because it made this attempt. It opened up, in place of democracy organized around the vox populi, an inscriptive and temporally extended democracy. American constitutionalism opened up the possibility of democracy as demo-graphy: of a people writing down its foundational commitments and living under these commitments for generations to come. Written constitutionalism denies the desirability (and perhaps the possibility) of self-government *at any given time*. It rather embraces the struggle for self-government *over time*.

We can therefore summarize democracy as demo-graphy in three theses. The first has to do with peoples:

(1) *The Popularity Thesis.* A people, considered as a collective and temporally extended agent, is a proper subject or "self" in the project of democratic self-government.

The popularity thesis ("popularity" referring to the condition or status of being a people) does not claim that peoples are just like persons. But it does assert that there is such a thing as a people, that a people exists over time, and that it must be recognized as a collective subject for some political purposes.

One could object to this thesis on a number of grounds. The word "people," it might be said, is pure reification except when used as the plural of "person." Or the only proper subject of self-government is the individual. Or even if popular self-government were an admissible concept, it would not apply to U.S. history, because Americans cannot be said to make up a single people,

and surely the American people that made the Constitution cannot be said to be the same people as the one that exists today.

These are serious objections, one and all. To say that the Constitution's legitimacy depends on rejecting them hardly offers a refutation. But it is so. If the Constitution legitimately binds us today, it does so insofar as we are members of the same people that gave itself this law.

Doubtless the idea of a people persisting over time romanticizes. But so does the idea of a person persisting over time. Without even attempting to argue for the thesis here, I will say only that, ultimately, I don't think the obstacles to regarding political communities as persisting agents over time are greater than the obstacles to regarding persons as having a persisting identity over time. What must be avoided at all costs is the notion that we are speaking here of a "collective will," an "organic" group, a "moral person" whose identity, once established, would transcend and supplant that of its constituents. What must be avoided is the old duality in which we are asked to view a people as either a solid particle of personhood (with a will of its own) or else an epiphenomenal wave (in which case the real entities are the "atomic" individuals).

This is the duality in which the feckless quarrel between liberalism and republicanism runs its entire course. Liberalism believes in individuals and insists that the very idea of collective subjectivity threatens individuality, whereas republicanism believes in the political nature of human identity and insists that the very idea of individuality threatens community. But both parties agree on the need to choose between these two poles of subjectivity in thinking through self-government. Either self-government must consist of government by a "common will"⁵⁴ or else self-government must exclusively be a matter of each individual governing himself.⁵⁵ Can we never move beyond this outdated political physics?

The idea of recognizing the agency of both peoples and persons in self-government could be put as follows. Humans cannot meaningfully achieve self-government as individuals. Not because our identity is essentially communal, rather than individual, so that self-government could intelligibly exist only at the communal level. The reason is simpler. We live in societies. We interact. If the basic rules and long-term consequences of these interactions are to be governed at all, they must be governed by law. No individual but a king (and perhaps not even he) can live under law of his own making. But a polity can live under law of its own making. In this simple but decisive sense, self-government is attainable for individuals only through their membership in a political community that gives itself its own law. At the same time, self-government is not attained for individuals, but obliterated, if the law prohibits them from exercising their own capacity for self-life-writing.

But what is a people? How are we to understand popularity in a way that does not make the subjectivity of a people exclusive of or antithetical to that of individuals? Suppose we just say that a people consists of the set of persons who are members of a particular society, and suppose we define a society as a set of persons living under a particular political-legal system. (This means that citizens of the United States are to be differentiated from Canadians not by reference to some uniquely American (as opposed to North American) values or attributes, but by reference to the legal boundary between the two countries. It also means that there may be subpeoples within a larger, national people, because there may be subsidiary political-legal systems within a larger one.) Because this people is not imagined as some sort of organic body in mystic terms, we need not attribute to it any collective will. But this people would be romanticized just enough to imagine it as capable of having commitments. This capability would only mean, however, that the persons who are members of this people are able to share in great numbers important convictions on the basis of which they are prepared to act. These convictions can be the basis of popular commitments.

I will not try to defend this notion of popularity here (even though I recognize that saying a little about matters such as these is probably worse than saying nothing at all). Instead, having raised the subject of popular commitments, let me turn to the second thesis of democracy as demo-graphy:

(2) *The Commitment Thesis.* Self-government is achieved not when a self is governed by its own will or consent, but when a self lays down and lives up to its own commitments over time.

The significance of the commitment thesis lies in recognizing commitment as a moral or normative operation that is profoundly different from the classically liberal operations of consent or choice. The latter are the proper normative operations if the agent's normative authority over himself (his ability to bind himself) is to be crystallized in the exercise of a single moment's will. (As a result, consent and choice necessarily call up an endless conflict among past, present, and predicted will.) By contrast, commitment is the normative operation a temporally extended subject engages in when, without entering into an agreement with another, he imposes temporally extended obligations on himself. Here are some of the differentiating characteristics of commitment.

An act of consent or will is completed at a single moment, but a commitment is not made at any particular moment. It takes time to commit oneself. Saying that one is committed to something – even saying it sincerely, even saying it in writing, even promising it – doesn't make it so. One can *decide* to commit oneself at a given moment, but being committed requires more.

Every commitment requires at a minimum a commitment of time: a commitment of some portion of one's precious time on earth.

The obligations perfectly entailed by an act of consent or choice are in principle reducible to those the self intends to be imposing on itself. To the extent that we hold a consenting party to a nonintended obligation, it is either because we have implicitly moved from the domain of consent to that of commitment or because we are appealing to other, nonconsensualist grounds: reliance, assumption of risk, public policy, and so on. A commitment, by contrast, is always an engagement not only with an uncertain future, but with an object at least in part external to self: a principle, a relationship, an institution, a cause, a goal. The object of the commitment will have its own, independent requirements.⁵⁶ And although these requirements will invariably be subject to interpretation, the obligations of a commitment cannot as a result be measured by or reduced to a mental state of the committing party at any particular time – past, present, or predicted. Interpreting a commitment cannot be reduced to a determination of intentions. To live up to a commitment, one cannot ask merely: What did I intend at the moment when I made this commitment (or what do I will now, or what will I will at some predicted moment)?

On the other hand, the obligations of a commitment are not to be regarded as purely external either. Interpreting a commitment is not only a matter of thinking through the requirements entailed by the object of the commitment. One must also think through: What am *I* committed to in being committed to this object? For one person's commitment to a principle, a purpose, a relationship, and so on may be different from another's. At stake in interpreting a commitment is an interpretation of one's own life: a re-collection of one's temporally disparate experiences.

Finally, we can know the entailments of our commitments only by living them out. We cannot know in advance what our deepest commitments will turn out to require of us. This is so because with principles, institutions, relationships, or other objects of deep commitment, moral knowledge requires more than speculation. It requires a period of living with and living under. Those, for example, who memorialized the U.S. Constitution's commitment to the equal protection of the laws could not know in advance what all the requirements of this principle would be, precisely because no one then had ever lived with or under it. What they did know – and what can never be forgotten – will be considered shortly.

The combination of the first two theses produces a third:

(3) *The Constitutionalism Thesis.* A people attains self-government not by perfecting a politics of popular voice, but by way of an inscriptive politics, through which the people struggles to

memorialize in foundational law, and to live out over time, its own foundational commitments.

For a people to be self-governing, there must be more than a politics permitting citizens to give voice to their will. There must be an inscriptive politics at the foundation of the legal order. This inscriptive politics would include institutions through which the polity could memorialize, preserve, interpret, enforce, and rewrite its fundamental political commitments over time. The first freedom of a self-governing people is not, therefore, the freedom of speech. It is the freedom to write: to give oneself a text. A fully self-governing people must be the author of its own constitution.

If constitutional law embodies this inscriptive politics, then there is no countermajoritarian difficulty. Why? Because the countermajoritarian difficulty is more (it must be more) than a claim that judicial review sometimes produces countermajoritarian results. The *difficulty* referred to is not countermajoritarianism as such; the difficulty, as Bickel observed, is that this countermajoritarianism makes constitutional law “undemocratic.”⁵⁷ It makes constitutional law “a deviant institution” in “American democracy.”⁵⁸ The countermajoritarian difficulty, in other words, is a formulation of the antithesis between constitutionalism and democracy with which speech-modeled thinking begins. It holds only if democracy is equated with some version of present-tense, speech-modeled self-government.⁵⁹ But written constitutionalism is not antithetical to democratic self-government. It is democratic self-government, over time.

To illuminate the view I have just outlined, let me point out differences between it and some of the prominent, prevailing efforts within constitutional thought to conceptualize written constitutionalism within a democratic polity. To begin with, the demo-graphic perspective explains originalism’s utter failure. Originalism seeks to reduce the nation’s temporally extended commitments to a moment’s act of will; it seeks to read the written Constitution as an expression of popular voice. By contrast, processualism (which invites us to understand constitutional guarantees as the necessary conditions of the process of forming and effectuating *present* popular will) fails to capture the historicity of constitutional law. On the processualist view, all constitutions ought to provide the same rights; the particular constitutional struggles of a given nation’s history are incidental. Processualism has no place for a politics of constitution-writing or for the substantive constitutional commitments that emerge from it.

One account that does capture the importance of constitutional politics and constitutional history is Professor Ackerman’s, which brings back a much-needed emphasis on higher lawmaking into American constitutional thought.⁶⁰ But Ackerman still conceptualizes this higher lawmaking in terms

of time-punctuated moments ("constitutional moments")⁶¹ and hence in terms of the model of speech. What results is an insistence on popular will and voice⁶² that culminates in a stunning disparagement of constitution-writing and constitutional text. The "commanding voice of the People"⁶³ is so triumphant here that Ackerman ends by arguing for constitutional amendments never written or enacted, which have (apparently) superseded provisions that a less rigorously speech-modeled reader might have supposed were still part of the operative text.⁶⁴

Ronald Dworkin, important as he has been to jurisprudence in general, has not yet been as influential in the domain of constitutional thought. Nevertheless, his approach has the virtue of capturing the normative openness of constitutional law and of avoiding fixation on any particular moment of democratic will. Dworkin's constitutionalism, however, is so systematically ahistorical that it is almost atemporal. Indeed, with the exception of those few still openly advocating natural law, Dworkin's constitutionalism comes closest today to the wholesale flight from temporality mentioned earlier. For him, constitutional rights are those rights that a philosopher-god would announce if called on to make the Constitution the morally, legally, and politically best constitution it could be.⁶⁵ Demo-graphy is (if only just slightly) more modest. It insists that the Constitution be understood and preserved as the law that a particular people, with a particular history, gave itself – whether or not this makes the Constitution the best it could be. These remarks return us to the problem of interpretation.

C. Interpretation: The Paradigm-Case Method

If we took the demo-graphic view of the Constitution, what would our interpretive method look like? I will call demo-graphic interpretation *reading the Constitution as written*.

Here are the constraints: Reading the Constitution as written (resting on a theory of self-government through exercise of the freedom to write) must take text seriously. More than this, it must give a privileged position to the "Founding" in the following sense. It must give privileged significance to the particular, historical struggles of constitution-writing on which demo-graphy depends and with which it begins. In some special, privileged fashion – which we will have to specify carefully – reading the Constitution as written must preserve our constitutional commitments as the original commitments the people gave itself. On the other hand, reading the Constitution as written cannot reduce constitutional meaning to the democratic will of the "founding moment" or any other moment – past, present, or predicted. For that would destroy constitutional law's claim to legitimate authority, by subjecting a temporally extended people to the (putatively) democratic will of a given mo-

ment. A commitment, as we have seen, if it is to be honored at all, must be honored even though what it requires is contrary to the will of the committed party at any particular moment. To read the Constitution as written, then, is to honor the constitutional commitments the United States gave itself in its actual, historical struggles of constitution-writing (there can be no recourse here to timeless or pre-political rights), while never reducing these commitments to the democratic will of any particular moment. How can this be done?

There is an interpretive method that satisfies these requirements: the paradigm-case method. It may or may not be the only way to read the Constitution as written. But if constitutional method does not at least look greatly like the method I am about to describe, it is difficult to believe that the requirements specified earlier will be fulfilled.

In the paradigm-case method, the initial question in interpreting a constitutional right is always this: What are the core historical applications of this right? In particular, what were the abuses of power that those who fought for this right fought most centrally to abolish? This is a question of fact, and it will in general be an answerable question of fact. If we inquire into the general principles originally understood to lie behind a constitutional provision, we may find vast disagreement. If we inquire into the original (ratifiers') intent concerning most of the myriad specific constitutional controversies that arise today, we are likely to find no answer at all. But we are much more likely to find positive answers if we ask instead, Was there a set of core applications of this right, were there circumstances to which all or almost all of those who fought for this right would have agreed that it applied, were there one or two or three prohibitions that they would have overwhelmingly agreed on?

These core applications are a constitutional provision's foundational paradigm cases. They are inviolable, because they define the provision. They create the paradigm(s) through which it is to be interpreted. Any interpretation of a constitutional right under which the right would not prohibit the core abuses it was enacted to prohibit is categorically wrong.

Why? Suppose that Mississippi passed a statute barring blacks from serving on juries or making it a crime for blacks to behave insolently toward whites. And suppose the Supreme Court upheld this statute, changing its equal protection framework to require only that legal classifications be rationally related to legitimate state interests. What is so wrong with the Court's decision? What entitles us to say categorically that the decision is a constitutional outrage?

Well, one thing we could say is that the Court's decision is indefensible on its own terms (and therefore hypocritical, irrational, etc.). There is no conceivable legitimate state interest, we might say, to which Mississippi's statute could possibly be rationally related. But suppose Mississippi offers empirical

proof that discriminating against blacks in this way will on the whole create a net gain in overall social utility. Is increasing social utility an illegitimate state interest? Does the Mississippi statute stand or fall on the correctness of the state's empirical claim?

Another thing we might say is that the Mississippi statute flies in the face of contemporary national norms. But would this response mean that if enough states passed the same law, then it would be constitutional (or less categorically unconstitutional)? Does it mean that if Congress passed the same law, the federal statute would not be (categorically) unconstitutional?⁷⁶⁶

Shall we say, then, that the Court's decision is categorically wrong because it contravenes original intent? The Court's decision certainly does depart from the original understanding of the Fourteenth Amendment, but if modern equal protection doctrine is not to be rejected wholesale, that fact alone cannot be enough to reject what the Court has done. For the Court's desegregation decisions also departed from the original intentions, and so did the Court's decision to strike down sex discrimination under the equal protection clause. If Mississippi's hypothetical statute is categorically unconstitutional, it had better not be because Mississippi has not obeyed the original intentions underlying the Fourteenth Amendment.

But perhaps someone dedicated to justice-based constitutional interpretation (Lawrence Sager, Chapter 6, this volume, provides an excellent illustration) will have a very different answer. "The Mississippi statute is grossly unjust," he might say, "regardless of original intentions and regardless of where the nation currently stands on the issue. That is why it is categorically unconstitutional." But not everything unjust (as even Professor Sager acknowledges) violates the Constitution. "All the same," it might be said, "the question posed was 'What is so wrong with the Court's decision?' and the correct answer to that question is that the decision is monstrously unjust."

Putting the wrongness of the Court's decision on this footing alone is not satisfactory. It misses the fact that the justices have violated a primary duty of constitutional interpretation. The justices have done something not only unjust, but interpretively illegitimate: They have allowed a state to do exactly what a state was supposed to be prohibited from doing as a result of the enactment of the Fourteenth Amendment. They have in one stroke of "interpretation" excised from constitutional law the heart of the struggle that culminated in the Fourteenth Amendment. They have erased the American people's actual, historical act of constitution-writing through their putative interpretation of the constitutional text.

On what basis do I say so? The Southern black codes – imposing certain legal disabilities on blacks alone, including precisely the kind of provisions reenacted in Mississippi's hypothetical statute – were the Fourteenth Amendment's paradigm cases. They were the core abuses the amendment was en-

acted to abolish. This is what entitles us to say categorically that the Court's decision was wrong, no matter what one's ideology, no matter what views of justice one holds, no matter what position a current national majority takes. Black codes are in this sense definitive of the Fourteenth Amendment. If it means anything, the Fourteenth Amendment means that such laws are unconstitutional. Paradigm cases, we might say, represent facts about constitutional meaning, facts that precede all interpretation. Judges are without authority to "interpret" a provision of the Constitution contrary to its paradigm cases. Judges who do so have not interpreted the Constitution at all; they have rewritten or unwritten it.

This is not originalism. Core foundational prohibitions are privileged, but the original understanding is privileged no further. Deciding on everything else (beyond the paradigm cases) that the Fourteenth Amendment may or may not prohibit remains a matter of interpretation. For example, even if every framer and ratifier of that amendment intended it to permit race-segregated schooling, *Brown v. Board of Education*⁶⁷ would be nonetheless defensible. For the paradigm cases of a constitutional right consist (as already stated) only of that which the right was intended at its core to *prohibit*. The original understanding of what a constitutional right *permitted* has no such foundational standing.

Why exactly is the intent to prohibit privileged in this decisive way over the intent to permit? Constitutional law begins with constitution-writing, and the latter begins with a never-again. When a right is written, the constitutional change that occurs does not consist of setting in stone the power of government to do this or that. Such a commitment to governmental power is perfectly possible; the United States Constitution contains many power-granting provisions. (I will return to them in a moment.) But a commitment of power to a particular governmental body is not what is effected by a constitutional right limiting that body's actions. The constitutional change effected by a right consists, rather, of setting in stone what some actor or actors shall never do again. "*This shall occur here no more*" is the meaning of a constitutional right. Reading the Constitution as written requires that the core of this never-again – written, perhaps, in blood – must always be honored. To be sure, if the legitimate authority of constitutional law hung on the consent of the governed, there would be as good a reason to preserve the original understanding of what a right was to *permit* as there would be to preserve what the right was to *prohibit*. But commitment is not consent. Those who make commitments may always be in for more than they originally foresaw.

To repeat, commitments come fully into being only as they are lived out. Their true entailments cannot be known by ex ante or a priori philosophizing. One can know them only by living with or under the principles, institutions, or whatever else one has committed oneself to. I have already observed one

reason for this: the necessity of lived experience for the moral knowledge of a commitment. The other reason is the human capacity for hypocrisy and rational injustice in a neighbor's house, while failing to observe the same injustice at home. But when that neighbor's injustice is given a name and when its abolition is committed to writing, there can only be a short time before what has been invisible begins to demand recognition. Time has a way of embarrassing those of us who proclaim dedication to a principle. It has a way of revealing our shortcomings – and as a result, of making it possible for us to be truer to our commitments.

Thus, the original intent to permit can never be accorded foundational status in the interpretation of a constitutional right. A commitment to a principle of justice or liberty is a commitment to see that principle through, even if it requires one to give up practices that seemed perfectly reasonable, perfectly natural, at the time one embarked upon the commitment. No matter how widely held, and no matter how intensely felt, was the original understanding that the Fourteenth Amendment permitted discrimination against women, this understanding deserves no deference in Fourteenth Amendment interpretation. It was an instance of a failure to live up to principles, just as slaveholding was for those who subscribed to the Declaration of Independence. What else a right prohibits (beyond its core applications) is a matter of interpretation, reserved for the future to decide.

I have so far been referring to the foundational paradigm cases: those that actually motivated the struggles of constitution-writing. Supplementing the foundational paradigm cases are additional ones established by precedent. The paradigm cases set up by precedent can be of greater or lesser entrenchedness. They can even attain coequal status with the foundational paradigm cases, but they can never attain a higher status.

The case-by-case work of constitutional interpretation consists of formulating and applying principles and rules of application that capture the paradigm cases. This means three things. First, these principles and rules must cover – be consistent with – the paradigm cases.⁶⁸ Second, they must explain the paradigm cases as cases of the actual textual proposition. (The following rule for equal protection law – any state statute that singles out blacks for adverse treatment is unconstitutional as long as it was passed by a state below the Mason–Dixon line – would cover the paradigm cases, but would not capture them as cases of the prohibition set forth in the text.) There must, in other words, be a return to the text in the effort to formulate principles and rules of application on the basis of paradigm cases. Interpretation must always make sense of the text; it must be consistent at a minimum with the words used. The return to the text may not be a stringent requirement, but it is not toothless. Current Eleventh Amendment law, for example, covers the paradigm cases but fails the return to the text.⁶⁹

Finally, not only must interpretation be consistent with the paradigm cases, it must take its shape from them. They must be at the heart of the constitutional rules and principles, just as they were of the constitutional enactment itself. In other words, rules and principles of application must emerge from consideration of what the paradigm cases stand for. Interpretation must answer the question of what it means for the nation to be committed to these paradigm cases.

With respect to constitutional grants of power (as distinct from rights), the only difference in interpretive method is that here the paradigm cases consist of that which the constitutional provision was centrally intended to *permit*. The reasoning is the same. The constitutional change effected by a power-granting provision is to establish permission for some actor or actors to do something. Hence, the paradigm cases of this constitutional transformation are the core cases of what was to be permitted. What else the grant of power allows is a matter of interpretation.

Perhaps it will be objected that rights and powers differ in a critical respect that has not been accounted for. A right does not grant government any power whatsoever. Constitutional rights do not in any way expand or create governmental power; they merely limit powers already there. But the reverse (it might be said) is not true of powers. The enumeration of Congress's powers, in particular, was specifically and centrally intended to limit governmental power even as it created such power. Constitutional grants of power therefore have a double function – to permit and to limit – whereas the function of constitutional rights is solely to limit. It follows that the distinction between prohibitory and permissive intention cannot apply to powers as it does to rights. In the case of powers, paradigm cases of the intent to *prohibit* must be recognized as on a par with paradigm cases of the intent to *permit*.

But it is not true that grants of power have a double aspect not present in the case of rights. Commitments of power and commitments to rights share the identical logical and normative structure. To be sure, those who framed and ratified the Constitution's grants of congressional power centrally intended these powers to be limited in scope. But those who framed and ratified the Bill of Rights also centrally intended them to be limited in scope. A right in the Bill of Rights of universal scope would have been as utterly unthinkable as a universal grant of power in Article I (indeed, it would have been more so).

Moreover, constitutional permissions (grants of power) and limitations (rights) are equally subject to shortsightedness. If we commit ourselves to a particular institution, how do we respond when that institution makes a claim on us that extends beyond the reach we supposed it originally to have? Of course, we may always repudiate the commitment, but if we want to take it seriously, we cannot unreflectively hew to our original understanding of the institution's role in our lives. Rather, we will confront a question of interpre-

tation, which will in turn depend in an important way on the experience we have had of living under that institution. In resolving this question of interpretation, when we reflect on the essential or paradigmatic kinds of claim that we permit the institution to make on us, we may find that, properly understood, our commitment extends beyond our original understanding, imposing on us obligations both onerous and unexpected.

Consider the power granted to Congress under Article I to regulate commerce among the states. It was surely a clear and central understanding of most of the founders that this power did not permit Congress to ban slavery. Modern commerce clause doctrine, however, permits Congress to regulate employment and labor relations within the states. Is modern doctrine wrong because it countenances exercises of congressional power clearly understood in 1789 to be beyond Congress's reach?

Some believe the answer to this question is yes. Justice Thomas so indicated in a recent opinion.⁷⁰ Others have said that the anti-intentionalist aspect of modern commerce clause doctrine (its permitting what was clearly understood originally to be prohibited) may not make modern doctrine wrong, but at least requires us to regard modern doctrine as an example of constitutional amendment through transformative judicial opinions.⁷¹

The paradigm-case method rejects both these conclusions. Interpretation is no more bound by the original understanding that the commerce clause would not permit Congress to regulate slavery than it is bound by the original understanding that the equal protection clause would not prohibit a state from banning women from the professions. To vest a central government with the authority to regulate commerce (even "among" states) is an awesome commitment of power. It is a commitment that, consonant with its paradigm cases, can quite properly be found to reach beyond specific late-eighteenth-century expectations.

Obviously I am not saying that it is somehow impossible for constitution-makers to put an exercise of power outside the national government's reach. Far from it. All they have to do is commit that limitation of power to writing.⁷² All the United States has to do, in order to vest the states with a substantive domain of exclusive power, is to commit itself to this power in writing. It never has.⁷³ Any substantive commitment of exclusive power to the states *would* require judges to preserve the paradigm cases of that commitment, prohibiting Congress from trespassing on the paradigmatic instances of state power. But in the absence of such a substantive commitment to exclusive state power, when judges interpret an Article I grant of power such as the commerce clause, they appropriately shape their rules and principles of application around what Congress is *permitted* to do under that clause (by reference to the foundational paradigm cases and to the precedent, at least if the precedent is not itself in question).

That is an outline of reading the Constitution as written. Its method demands and leaves considerable room for normative judgment in constitutional law. The paradigm cases will very rarely dictate a single possible set of principles or rules of application. They can be expected to rule out a great number of potential interpretive solutions, but they cannot generally be expected to rule in only one. As a result, judges will be obliged to consider a wide variety of factors – ranging from justice in the largest sense to administrative workability – in deciding among competing alternatives. A great deal will depend on the judges' constitutional instincts: their ideology, their sympathies, their qualities of feeling. Ultimately, however, the question judges must answer is interpretive: They must offer an interpretation of why a particular historical struggle merited a constitutional transformation. Implicitly or explicitly, their answer to this question will determine the shape of their constitutional adjudication.

IV. Conclusion

Illustrating how the paradigm-case method applies to concrete constitutional debates would be the best way to explain what in practice I mean by reading the Constitution as written. But doing so would require entire essays. The interested reader can find one such illustration elsewhere;⁷⁴ others are forthcoming.

Let me conclude instead with a word about constitutional amendment. There has never been a very good explanation in principle of a supermajoritarian amendment process. There are splendid pragmatic explanations – organized around the need for long-term stability – but no one has ever quite managed to explain why, if a political community is to govern itself, past-enacted law can deny to a current majority of voters, but grant to a supermajority, the right to alter or abolish that law as it pleases.

Demo-graphy can. If a majority could for one sublime moment have its way on all things – so that the perfect Rousseauian moment were attained, with complete agreement between present popular will and the exercise of state power – self-government would not have been achieved. A people is always free to tear down its monuments and repudiate its prior commitments. But a people does not attain political freedom by exercising this freedom to repudiate. Self-government takes time. Supermajoritarian requirements exist to ensure that when a people sets down foundational commitments, it does so through a process that ensures that the people is prepared to live by them for some extended period of time.

If written constitutionalism, together with its amendment process, were understood in the temporally extended fashion described here, we would be obliged to start thinking about self-government more historically than we do

today. Indeed, we would be obliged to think differently about “thinking historically,” with far more emphasis placed on authorship of the future. What ambitions, other than enhancing the usual economic indicators, do we have for our polities over the next fifty years? Over the next five? As the millennium breaks upon us, we find ourselves with unprecedented power to make our societies embody our dreams – if only we had dreams. Self-government requires an active, affirmative engagement with the future, despite all the risks that such engagements entail. We must commit ourselves to be free.

Notes

¹ As Socrates asked, when making ready to die. See Plato, *Crito*, in *Plato: Collected Dialogues* 27 (E. Hamilton & H. Cairns, eds., 1961). See also Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 11 Cardozo L. Rev. 919, 992–7 (1990).

² Christopher Tiedeman, *The Unwritten Constitution of the United States: A philosophical Inquiry into the Fundamentals of American Constitutional Law* (1890).

³ Tiedeman, for example, wrote that “the binding authority of law . . . does not rest upon any edict of the people in the past.” Id. at 122. Judges, he argued, had to desacralize the framers and “recognize the present will of the people as the living source of law.” Id. at 154. Three years later, Thayer wrote his famous essay counseling judicial restraint in the name of the virtues of self-government. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893). The Civil War and its aftermath were evidently decisive in this regard: Constitutionalism had not seemed problematically undemocratic to, say, Lincoln or Cooley. (For an excellent overview, see Paul Kahn, *Legitimacy and History* ch. 3 [1992].) But the theme has been ineradicable for us ever since, highlighted in the first decades of this century by Holmes (and in a different way by Beard), in the 1930s and 1940s by the fight over the New Deal, in the 1950s by Hand (see Learned Hand, *The Bill of Rights* [1958]), in the 1960s by Bickel (see Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* [1962]), in the 1980s by Ely (see John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* [1980]), and in this decade by too many to name.

⁴ Thomas Jefferson, 5 *The Writings of Thomas Jefferson, 1788–1792* 116 (1895). See also, e.g., Thomas Paine, *The Rights of Man*, in *The Life and Major Writings of Thomas Paine* 251 (P. Foner, ed., 1961) (“Every age and generation must be free to act for itself, *in all cases*, as the ages and generations which preceded it”) (original emphasis).

⁵ Thomas Jefferson, *Letter to James Madison* (September 6, 1789), in 15 *The Papers of Thomas Jefferson* 392, 392 (J. Boyd et al., eds., 1958). Webster expressed the same view. “[T]he very attempt,” he warned, “to make perpetual constitutions, is the assumption of the right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia.” Noah Webster, *On Bills of Rights*, 1 Am. Mag. 13, 14 (December 1787);

see Gordon Wood, *The Creation of the American Republic: 1776–1787* 379 (1969).

⁶ See Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *Constitutionalism and Democracy* 200, 207–12 (J. Elster & R. Slagstad, eds., 1988).

⁷ T. Hobbes, *Leviathan* pt. 2, ch. 26 at 204 (1965).

⁸ See J. Bodin, *Six Bookes of a Commonweale* bk. I, ch. 8 at 91–9 (1962); S. Pufendorf, *De Jure Naturae et Gentium* bk. 1, ch. 6, sec. 7 at 94; bk. 7, ch. 6, sec. 8 at 1064 (C. H. & W. A. Oldfather, trans., 1934); J.-J. Rousseau, *Sur le gouvernement de Pologne*, in *3 Oeuvres Complètes* 981 (B. Gagnebin & M. Raymond, eds., 1964).

⁹ See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind., L. J. 1, 3 (1971) (“Society consents to be ruled undemocratically within defined areas by certain enduring principles . . . placed beyond the reach of majorities”).

¹⁰ The putative grounds of implied consent are typically failure to amend, failure to leave the country, or failure to take up arms. It is not hard to show that each of these “failures” is a very weak reed on which to sustain a legitimate inference of present majority consent. But the point is not worth arguing. Suppose we grant that, as a matter of fact, a majority of Americans today, in an up or down vote on the Constitution as a whole, would vote in favor of it. I hope and expect they would (although the artificiality of the choice between the Constitution and nothing, together with the high likelihood of suppressed Condorcet paradoxes, would significantly weaken any effort to say that such a vote proved much about majority will). The real question is whether the existence of current majority consent to the Constitution somehow does away with the constitutional problem of time. For the reasons that follow in the text, it does not.

¹¹ The same trap ensnares those who believe that the answer to the problem of time is to facilitate the amendment process. Professor Amar, for example, has argued for a majoritarian amendment process on the ground that it alone could justify an inference (from failure to amend) of present majority consent. See Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1064–6 (1988). Professor Amar’s reasoning is correct, but the vision of up-to-date amendments that make the Constitution conform perfectly to majority will does not solve the problem of time. It once again concedes that problem’s insuperability and, in doing so, surrenders the very heart of American constitutionalism itself.

¹² See Bickel, *supra*, note 3 at 16–17.

¹³ See, e.g., Stanley Fish, *There’s No Such Thing as Free Speech* ch. 12 (1994); S. Knapp and W. Michaels, *Intention, Identity, and the Constitution*, in *Legal Hermeneutics* 187 (G. Leyh, ed., 1992); P. Campos, *Against Constitution Theory* 4 Yale J. L. & Hum. 279 (1992).

¹⁴ No one is a self-proclaimed vulgar deconstructivist. But for citations to work that falls at least on occasion into vulgar deconstruction, see notes 21 and 22 below.

¹⁵ Ronald Dworkin, *Law’s Empire* 53, 228–32, 380 (1986).

¹⁶ See Hans-Georg Gadamer, *Truth and Method* 324–30 (1994). Describing the “exemplary significance of legal hermeneutics,” Gadamer finds in legal interpretation

"the model for the relationship between past and present that we are seeking." *Id.* at 324, 327–8.

¹⁷ See, e.g., Richard Posner, *Law and Literature* 228–9 (1989).

¹⁸ See, e.g., S. Knapp and W. Michaels, *Intention, Identity, and the Constitution*, in *Legal Hermeneutics* 187 (G. Leyh, ed., 1992). Of course, to make sense at all, the universal hermeneutic approaches to constitutional law must start with the premise that judges are to *interpret* when deciding constitutional cases – a premise that may itself depend on claims about political legitimacy. But the point is that once it is settled that judges are to interpret, the universal hermeneutic approaches take the position that they can work out in general terms what constitutional interpretation must look like or must aspire to solely by reference to a theory of interpretation as such.

¹⁹ Fish, *supra* note 13 at 185 (emphasis added). I have omitted sentences in which Fish considers the possibility that the every-third-word reader imagines his author as having written in an every-third-word code. *Id.* As Fish observes, on that supposition, the every-third-word reader engages in a straightforwardly intentionalist decoding. *Id.*

²⁰ Stanley Fish, *Is There a Text in This Class* 327 (1980).

²¹ Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 Yale L. J. 743, 774–5 (1987) (quoting Jonathan Culler, *On Deconstruction: Theory and Criticism after Structuralism* 176 [1982]).

²² Gary Peller, *The Metaphysics of American Law*, 73 Calif. L. Rev. 1152, 1188 (1985).

²³ Here is Derrida: "[H]ow surprised I have often been, how amused or discouraged . . . by . . . the following argument: Since the deconstructionist (which is to say, isn't it, the skeptic-relativist-nihilist!) is supposed not to believe in . . . intention or "meaning-to-say," how can he demand of us that we read *him* with pertinence, precision, rigor? How can he demand that his own text be interpreted correctly? . . . The answer is simple enough: this definition of the deconstructionist is *false* (that's right: false, not true) . . ." (J. Derrida, *Limited, Inc.* 146 [S. Weber, trans., 1988] [original emphasis]). Derrida specifically rejects the idea that all interpretation is misinterpretation. "I do not think nor have I ever said that 'any interpretation is inevitably a false interpretation, and any understanding a misunderstanding.'" *Id.* at 157 n. 9. If one attends to Derrida's own readings of others' texts, the central role accorded not only to intentionality but to right intentionalist interpretation is unmistakable. To give just one of many examples: Criticizing Michel Foucault's reading of a certain passage in Descartes, Derrida not only repeatedly refers to Foucault's "intentions," but bases his entire reply on the claim that Foucault mistook what Descartes "said and meant." J. Derrida, *Cogito and the History of Madness*, in *Writing and Difference* 31, 32 (1978) ("[H]as what Descartes said and meant been clearly perceived?").

²⁴ See, e.g., Peller, *supra*, note 22 at 1170.

²⁵ Note that vulgar deconstruction cannot take the position that it too is merely another ideological construct, making no claim whatsoever to truth or to rightness. For then vulgar deconstruction would be saying nothing at all. As if someone should say, "The sun will go out tomorrow – but by the way, what I say makes no claim to truth or to getting anything, including my own beliefs, right."

- 26 Worst-it-can-be interpretation is quite conceivable. A person could mount a version of *The Merchant of Venice* that deliberately rendered it as viciously anti-Semitic as possible, conceding that his interpretation made it a worse play – dramatically or morally – than other interpretations would. (He might say that his interpretation revealed the truth about the play more effectively than would an interpretation that makes the best play.) If Dworkin answered that *The Merchant* was here being made into the best anti-Semitic play it could be, either he would have trivialized his claim that interpretation should strive to make the interpreted object the best it can be, or else he would simply have shifted all the interesting problems to the stage of the inquiry at which one decides what sort of thing the interpreted object “is” (an “anti-Semitic play”) so that interpretation can then make it the best exemplar of that sort of thing it can be.
- 27 Obviously, to avoid self-contradiction, Dworkin must claim that his interpretation of interpretation *does* make interpretation the best it can be. This requirement he recognizes. See Dworkin, *supra*, note 15 at 49 (“[A]ny adequate account of interpretation must hold true of itself”). He apparently thinks that this requirement exhausts the self-referentiality problem. It does not.
- 28 See, e.g., *id.* at 53 (“Understanding another person’s conversation requires using devices and presumptions, like the so-called principle of charity, that have the effect in normal circumstances of making of what he says the best performance of communication it can be”), 63 (the possibility that interpreting “social practices” might properly consist of determining actual intentions of participants is “ruled out by the internal structure” of the practice, within which “the claims and arguments participants make, licensed and encouraged by the practice, are about what *it* means, not what *they mean*”) (emphasis in original).
- 29 For a very good example of this line of reply, see Larry Alexander, *All or Nothing at All?* in *Law and Interpretation* 357, 362 n. 12 (A. Marmor, ed., 1995).
- 30 Fish, *supra*, note 13 at 185 (original emphasis in the first case, added in the second).
- 31 *Id.*
- 32 Robert Bork, *The Tempting of America* 143–4 (1991).
- 33 *Id.* The first half of Bork’s book is an effort to show that constitutional interpretation has been significantly antioriginalist from just about the beginning. It is not clear to me why, given this showing, constitutional law itself does not count as a sufficient counterexample to the assertion that the meaning of law is necessarily the originalist meaning. I would be surprised to learn that the United States had never had any constitutional law, but evidently it must be so.
- 34 Charles Black, *The People and the Court* 182 (1960).
- 35 See Herbert Wechsler, *Toward Neutral Principles of constitutional Law*, 73 Harv. L. Rev. 1 (1959). For Bork’s use of Wechsler, see Bork, *supra*, note 9.
- 36 *Id.* at 12, 19 (emphasis added).
- 37 *Id.* at 16, 19.
- 38 See, e.g., *Casey v. Planned Parenthood*, 505 U.S. 833 (1992); Robert Post, *Constitutional Domains* ch. 1 (1995); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).
- 39 Joseph Raz, *The Morality of Freedom* 262 (1988).

⁴⁰ Joseph Raz, *The Authority of Law* ch. 9 (1979). Raz himself believes that his account of law generally warrants intentionalism. This is, I think, a point he may wish to reconsider. Raz may have an argument for *individuals* to follow legislative intent, but within Raz's framework *judges* do not seem at all forbidden (they may even be required) to come to their own best judgment of how the parties before them ought to act, according (in Raz's special use of the terms) to the reasons applicable to those parties. (The question would be whether judges could do so better than could the legislature, which is presumed to be able to do so better than could the individuals themselves.) Cf. Andrei Marmor, *Interpretation and Legal Theory* 176–84 (1992) (arguing that Raz's account warrants intentionalism in some but not all contexts). But if Raz's account of law does not warrant an open-ended “right reason” style of interpretation, it is sufficient for present purposes to observe that others’ (say, Dworkin’s) would.

⁴¹ See Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* 117 (1996).

⁴² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (original emphasis) (Marshall, C. J.).

⁴³ Jean-Jacques Rousseau, *On the Social Contract, or Essay about the Form of the Republic (Geneva Manuscript)*, in *On the Social Contract* 157, 168 (R. Masters, ed., J. Masters, trans., 1978).

⁴⁴ See Bickel, *supra*, note 3 at 16–18 (constitutional review “thwarts the will of representatives of the actual people of the here and now”; that is why constitutional law can be called “undemocratic”).

⁴⁵ This usage cuts across such dividing lines as republican, liberal, or fascist. Thus, Rousseau insisted that a people could not be free unless it spoke a “tongue” with which one could “make oneself understood to the people assembled.” Mill warned that popular assemblies ought not to try to “govern and legislate,” but to do only what they were properly constituted to do – “talk.” And Carl Schmitt wrote that the “natural way in which a People expresses its immediate will is through a shout of Yes or No by an assembled multitude.” (For citations and further examples, see Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 (Yale L. J. 1119, 1123–34 [1995].) These statements are not merely metaphoric. In every case, acts of speech – *literal* acts of speech – are said to be the necessary, proper, or natural medium of popular will formation and will expression.

⁴⁶ Consider these remarks from the definition of democracy in one venerable textbook:

[T]here must necessarily be some formula or mechanism for the making of decisions or the selection of policies. In a democracy this formula is majority rule. . . . But democracy has to recognize that a majority can become a tyranny which may ruthlessly destroy the rights of minorities temporarily at its mercy. . . . Thus there must be a balancing of majority power and minority rights. This is the most difficult issue facing any democratic society. . . . For one thing, there is a certain logical dilemma to overcome here. No political philosopher and no constitution-makers have ever quite succeeded in explaining away this dilemma.

R. Carr, M. Bernstein, D. Morrison, R. Snyder, and J. McLean, *American Democracy in Theory and Practice* 29–30 (rev. ed., 1956).

- 47 Jon Elster, Introduction to *Constitutionalism and Democracy* 1 (J. Elster & R. Slagstad, eds., 1993).
- 48 See, e.g., Robert A. Dahl, *Democracy and Its Critics* ch. 12 (1989); Jürgen Habermas, *Between Facts and Norms* (W. Rehg, trans., 1996); Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (1995).
- 49 See, e.g., John Rawls, *A Theory of Justice* (1971).
- 50 See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
- 51 The role of past will in originalism is obvious. Past will undergirds the “plain meaning” approaches insofar as what is sought under the label of “plain meaning” is the meaning that would have been understood by those who ratified the Constitution.
- 52 For the contemporary-consensus treatment see, e.g., Robert Post, *Theories of Constitution Interpretation*, 30 Representations 13, 30 (1990) (“fundamental ethos of the contemporary community”), and Harry H. Wellington, *Common Law Rules and Constitution Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 310 (1973) (“commonly held attitudes”). John Ely’s *Democracy and Distrust* (1980) has been by far the most influential processualist treatment of constitutional law. Ely argues that judicial review draws its democratic legitimacy from its serving to safeguard the democratic representative process.
- 53 Bickel ended that book by calling upon judges to “declare as law only such principles as will – in time, but in a rather immediate foreseeable future – gain general assent.” Bickel, *supra*, note 3 at 239. For an example of a Rawlsian approach to constitutional law see Professor Michelman’s influential *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation”* Law, 80 Harv. L. Rev. 1165 (1967).
- 54 See, e.g., Jürgen Habermas, *The Theory of Communicative Action* 81 (Thomas McCarthy, trans., 1987) (a democratic politics must strive toward implementation of a “common will, communicatively shaped and discursively clarified in the political public sphere”). For Habermas’s own efforts to move beyond the choice between individual and collective subjectivity, and hence beyond the choice between liberalism and republicanism, see his *Between Facts and Norms*, *supra*, note 47, esp. 287–314.
- 55 See, e.g., John Stuart Mill, *On Liberty* 3 (Oxford 1946). Rawls’s spectacular *Theory of Justice*, it should be noted, was not a repudiation of these two poles of subjectivity, but an effort to have both at once. For Rawls, each individual is to decide for himself and yet all are to end by speaking with a single voice. Hypothetical consent theories of this sort either are not consensualist at all or else are another version of the basic speech-modeled ideal: The ideal polis or town meeting is still alive, if only in the mind of political philosophy.
- 56 Professor Cover made a similar point, also in the context of constitutional law, fifteen years ago. See Robert Cover, *Nomos and Narrative*, in *Narrative, Violence and the Law* 93, 144–6 (M. Minow et al., eds., 1995).
- 57 Bickel, *supra* note 3 at 17.
- 58 *Id.* at 17–18.
- 59 Bickel’s version ran as follows: “[D]emocracy does not mean constant reconsideration of decisions once made,” but it “does mean that a representative majority has the power to accomplish a reversal.” *Id.* at 17.

⁶⁰ See Bruce Ackerman, *We the People: Foundations* (1991).

⁶¹ *Id.* at 51, 262–4.

⁶² *Id.* at 49, 171 (“rare periods of constitutional creativity, when the People mobilize and speak with a very different voice”), 183 (distinguishing between politicians who do and do not “speak” in “the *genuine* voice of the American people”) (original emphasis), 264 (“At such moments, the Supreme Court should bend to this new expression of constitutional will”), 286 (“the living voice of the People”).

⁶³ *Id.* at 185.

⁶⁴ Professor Ackerman claims that the Constitution was amended some time in the 1930s or 1940s by transformative judicial opinions (responding to decisive elections) that codified New Deal principles of activist government and unlimited federal legislative subject-matter jurisdiction. See *id.* at 40–57, 105–30.

⁶⁵ I note for the record that Dworkin insists his approach is not open-ended philosophy, but rather interpretation of actual constitutional text and practices. For example, judges are not free on his account (he says) to enforce unenumerated rights. Ronald Dworkin, *Freedom’s Law* 80 (1996). But rights that have seemed unenumerated to some seem to Dworkin to follow from express guarantees. See *id.* at 87–107 (defending the Supreme Court’s abortion decisions as an interpretation of the religion clauses).

⁶⁶ The United States Constitution’s equal protection clause applies only to states; the Court has, however, read an equal protection guarantee against the federal government into the Fifth Amendment’s due process clause. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). But it should be observed that the Fourteenth Amendment’s citizenship guarantee makes all persons born in the United States citizens of the United States. U.S. Const., Amdmt. XIV §1. And the status of citizens may, properly considered, include a certain right of equal treatment. In any event, for present purposes, we can put aside questions that might be raised about *Bolling*.

⁶⁷ 347 U.S. 483 (1954).

⁶⁸ Constitutional law has in fact almost always adhered to this cardinal rule. But see *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 231 (1934).

⁶⁹ The Eleventh Amendment, enacted in 1798, provides that the federal judiciary shall have no jurisdiction over suits brought “against one of the United States”—i.e., a state—“by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const., Amdmt. XI. The Supreme Court reads this language to bar federal jurisdiction over any suit commenced against one of the United States even by citizens of *that same state*. See, e.g., *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996).

⁷⁰ See his concurring opinion in *United States v. Lopez*, 115 S. Ct. 1624 (1995).

⁷¹ See Ackerman, *supra*, note 59 at 43–4, 51–2, 283–4.

⁷² There is no such thing as an unwritten commitment in written constitutionalism. Nevertheless, I believe there is a narrow but important place for unwritten rules of constitutional law within written constitutionalism. They are to be distinguished from commitments, however, and they can be legitimately enforced only when there is a case to be made that they are necessary conditions for the entire project of written constitutionalism. This is a matter worthy of much more attention, which I cannot devote to it here.

⁷³ With small exceptions, the Constitution’s demarcation of the states’ domain of ex-

clusive power is done purely by negative implication. See, e.g., U.S. Const., Amdmt. X ("[P]owers not delegated to the United States by the Constitution . . . are reserved to the States").

⁷⁴ See Rubenfeld, *supra*, note 44 at 1179–84 (takings clause).